TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted] 49.

TOYOTA, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED MAY 9, 1910.

(22,149)

(22,149)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 923.

TOYOTA, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 18, 1910.

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1 District Court of Honolulu, County of Honolulu, Territory of Hawaii.

Complaint.

Fred. Turrill first being duly sworn says:
That one Toyota did at Honolulu, City and County of Honolulu, Territory of Hawaii, during one month last past prior to and including the 14th day of September, A. D. 1909, unlawfully and wilfully engage in carrying on certain business to wit; Auctioneering without first obtaining a license for the carrying on of such business, contrary to Section 1331 of the Revised Laws of Hawaii.

(S'g'd) F. TURRILL.

Subscribed and sworn to before me this 15th day of September, A. D. 1909.

(S'g'd) FRANK ANDRADE,
District Magistrate of Honolulu, County of Honolulu.

2 This is to certify that the above is a true and correct copy of Original Complaint on File in the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

FRANK ANDRADE,
District Magistrate of Honolulu.

Endorsements.

Executed the within Warrant on the person of —— —— named therein, this — day of ——.

—— ——,
Police Officer.

District Court of Honolulu, County of Honolulu.
The Territory of Hawaii v. —— ——.
Warrant of Arrest.

3 In the District Court of Honolulu, City and County of Honolulu, Territory of Hawaii.

TERRITORY OF HAWAII
vs.
TOYOTA.

Stipulation of Facts.

In the above cause the facts are stipulated as follows, to wit:
That the Hawaiian Fisheries, Limited, is a domestic corporation, organized under the laws of Hawaii, and doing business at Honolulu.

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That said corporation handles and sells for a large number of fishermen, on commission, fish caught by such fishermen, and does so daily, in the following manner:

The catch, as soon as it comes in by boat is loaded into wagons and carried to the Fish Market, in Honolulu, and there an agent of said Hawaiian Fisheries, offers it in basket lots, each basket containing about from 70 to 100 pounds, to the retail dealers of fish only, and the one bidding the highest price for same, there and then becomes the purchaser. That at such sales no bid is received except from such retail dealers, or the persons conducting fish tables on the said market. That fish is highly perishable and must be quickly disposed of after being brought to market, and that the above plan is followed to facilitate the sale of fish when brought to market. The said corporation, if it cannot sell the fish brought to market in the manner above indicated, then must, under contract with the fishermen[t] who are its patrons, sell such fish at
4 retail. That the defendant, was at the time and place stated in the complaint against him, as agent for the said corporation, selling and offering for sale, fish in basket lots, in the manner above indicated, and not otherwise. That there are about 33 proprietors of fish tables on said market, who with their assistants, buy fish from said corporation, in manner as above stated. Neither the defendant, nor the said Hawaiian Fisheries Company, Limited, has obtained a license as Auctioneer, in and for the City and County of Honolulu, for the fiscal year commencing July first, 1909, or any part of said year. That the said Hawaiian Fisheries Company, Limited, has obtained and been operating under a Merchandise Brokers' license, and now has such license.

A. M. BROWN,
Deputy County Attorney for the City — County of Honolulu.
ATKINSON & QUARLES,
Attorneys for Defendant.

5 District Court of Honolulu, City & County of Honolulu, Territory of Hawaii.

TERRITORY OF HAWAII, Plaintiff,
v.
TOYOTA, Defendant

Notice and Certificate of Appeal.

I hereby certify that on the 9th day of October, 1909, in the above entitled cause, I entered judgment against the defendant, Toyota, adjudging him guilty — selling goods, wares and merchandise at auction, in the District of Honolulu, without first obtaining a license as auctioneer, contrary to section 1344 Revised Laws, and sentenced him to pay a fine of six hundred dollars, and costs one dollar — and that an appeal from said judgment was duly noted by said defendant Toyota, to the Supreme Court of the Territory

of Hawaii, on questions of law, to wit: That the Court erred in holding that the defendant was, under the facts as stipulated, guilty of conducting an auction; that the court erred in holding §1343 Revised Laws, valid, and that said appeal had since been duly perfected.

A full and correct copy of my record in said case is hereto attached.

Given under my hand this 14th day of October, 1909.

FRANK ANDRADE,
District Magistrate of Honolulu,
City and County of Honolulu.

Memorandum of costs:

Costs of court, paid by def't	$1.00
Notice and certificate of appeal	1.10
Total sent up herewith	$2.10

6 Endorsements.

NOTE.—Magistrates will do well, at the time of rendering judgment, to cause the annexed notice to be signed by the losing party, whether the appeal will be perfected or not. If the appeal is not perfected the certificate will not be signed or used. See Section 1858 Rev. Laws.

District Court of —, County of —, Territory of Hawaii.

TERRITORY OF HAWAII, Plaintiff and Appellee,
vs.
TOYOTA, Defendant and Appellant.

The Defendant in this case appeals from the judgment herein to the Supreme Court of the Territory of Hawaii, on questions of law, as follows:

1. The District Court erred in adjudging that the defendant is under the stipulated facts in the case, guilty of conducting an auction without a license, as charged. 2. The court erred in holding that section 1343, Revised Laws of Hawaii, is valid, the same being in contravention to the Fourteenth Amendment to the constitution of the United States in that it denies the equal protection of the laws to the defendant, said statute being unconstitutional and void *it* that it discriminates between the residents and citizens of the Honolulu Taxing District and those of all other taxing districts in the Territory of Hawaii.

TOYOTA,
By ATKINSON & QUARLES,
His Attorneys.

October 9th, 1909.

Filed October 9, 1909, and perfected.
B. P. ZABLAN, *Clerk.*

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No. 455. Supreme Court Territory of Hawaii. Territory of Hawaii, Plaintiff and Appellee, vs. Toyota, Defendant and Appellant. Notice of Appeal, Certificate and Record from District Magistrate of Honolulu, City and County of Honolulu. Received $2.10. Filed October 14, 1909. J. A. Thompson, Clerk.

7 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

TERRITORY
v.
TOYOTA.

Appeal from District Magistrate, Honolulu.

Argued November 8, 1909. Decided December 1, 1909.

Hartwell, C. J., Wilder and Perry, JJ.

Constitutional Law. Auction License Fees.

Section 1343, R. L., is not unconstitutional in its requirement for an auction license of a fee of $600 for the district of Honolulu and $15 for each other taxation district.

Auctions and Auctioneers. Public Auctions.

Upon the agreed facts the defendant conducted a public auction within the meaning of the statute.

Opinion of the Court by Perry, J.

(Wilder, J., Dissenting.)

Defendant appeals on points of law from a conviction before the district magistrate of Honolulu of the offense of "selling goods, wares and merchandise at auction in the district of Honolulu without first obtaining a license as auctioneer." Section 1343 of the Revised Laws requires an annual fee for a license to sell goods, wares and merchandise or other property "at auction," naming a fee of $600 for the district of Honolulu and $15 for each other taxation district. The defendant's points are that under that section licenses are required only for sales at *public* auction, that the facts proved constitute no offense and that the statute im-
8 properly discriminates between residents and citizens of the district of Honolulu and those of the other districts and is contrary for that reason to the 14th amendment of the constitution. The only other portion of the statute which can be invoked as throwing any light on the meaning of the words "at auction" in section 1343 is the requirement in Sec. 1345 that the bond given by each auctioneer "upon receiving an auction license" shall contain a provision "that he will not sell goods, wares, merchandise or other

property except at public auction." It is not clear that there is any difference in meaning between the words "at auction" and the words "at public auction." Whatever difference, if any, there may be, it may be assumed for the purposes of this appeal that, as contended for the defendant, it is a *public* auction which is contemplated by the statute and the question, then, is whether on the evidence the defendant conducted a public auction.

The evidence consisted merely of an agreed statement of facts, that statement being as follows:

"That the Hawaiian Fisheries, Limited, is a domestic corporation, organized under the laws of Hawaii, and doing business at Honolulu.

"That said corporation handles and sells for a large number of fishermen, on commission, fish caught by such fishermen, and does so daily, in the following manner:

"The catch, as soon as it comes in by boat is loaded into wagons and carried to the Fish Market, in Honolulu, and there an agent of said Hawaiian Fisheries, offers it in basket lots, each basket containing about from 70 to 100 pounds, to the retaia dealers of fish only, and the one bidding the highest price for same, there and then becomes the purchaser. That at such sales no bid is received except from such retail dealers, or the persons conducting fish tables on the said Market. That fish is highly perishable and must be quickly disposed of after being brought to market, and that the above plan is followed to facilitate the sale of fish when brought to market. The said corporation, if it cannot sell the fish brought to market in the manner above indicated, then must, under contract with the fishermen who are its patrons, sell such fish at retail. That the defendant, was at the time and place stated in the complaint against him, as agent for the said corporation, selling and offering for sale, fish in basket lots, in the manner above indicated, and not otherwise. That there are about thirty-three proprietors of fish tables on said market, who with their assistants, buy fish from said corporation, in manner as above stated.

"Neither the defendant, nor the said Hawaiian Fisheries Company, Limited, has obtained a license as Auctioneer, in and for the City and County of Honolulu, for the fiscal year commencing July first, 1909, or any part of said year. That the said Hawaiian Fisheries Company, Limited, has obtained and been operating under a Merchandise Broker's license, and now has such license."

9 That the defendant conducted an *auction* sale is beyond doubt. It was a sale by competitive bids where the seller invited and excited competition and disposed of the property to the person who made the highest bid. The practice of conducting such sales "is said to have originated with the Romans who gave it the descriptive name of *auctio*, an increase, because the offered property was sold to him who would offer the most for it." *Crandall* v. *State*, 28 Oh. St. 479, 481. "The essential part is the selection of a purchaser from a number of bidders," says Bouvier after defining an auction as being "a public sale of property to the highest bidder." Whether the sale be "by the inch of candle" or at Dutch

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auction or in the method ordinarily pursued at the present time, competition is a necessary element (*Crandall* v. *State*, supra, 482) and it is that which distinguishes a sale at auction from other sales where the attempt to sell and to agree on a price is made with but one prospective purchaser at a time.

Does the fact that bids were accepted from retail dealers of fish, and from no others, place the transactions without the class of sales at public auction within the meaning of the statute? We think not. In the word "auction" itself there is nothing to lead to the opposite conclusion. In so far as the word "public" imports publicity, a sale free from concealment, open to the knowledge or view of all, as opposed to one in private or unknown to the community at large, that element clearly existed in the transactions under consideration. There was no attempt at concealment or secrecy. Aside from this element the word "public" is susceptible of various shades of meaning. It may be so used as to have reference to all of the members of a community, state or nation, or as referring to the community in general or a considerable portion of it. It is in the latter sense, we think, that it is used in the statute in question. The sale was none the less public because of the exclusion from bidding of the class which was excluded. The sale was of lots of fish varying from 70 to 100 pounds each. The class admitted to bid, the retail dealers of fish, included practically all who would be likely to offer bids. The main purpose of auction sales is to obtain the best financial returns for the owners of the property sold. Some measure of discretion is vested in auctioneers as to the precise methods to be pursued in attaining that object, for example, bids need not be accepted from minors or from persons irresponsible either financially or mentally or from drunken persons or from one offering in bad faith or even from one making but a slight raise in his bid over the bid last announced. See *Taylor v. Harnett*, 55 N. Y. Suppl. 988, 990, 991.

It may well be conceived that an auctioneer may in good faith and in the exercise of a proper discretion deem it to be to the best interests of his principals, in a series of sales such as described in the agreed statement, to refuse to sell to the consumers who in rare instances might possibly appear and bid to the financial detriment of the retail dealers who in large numbers, and regularly, attend such sales and purchase the great bulk of the fish. If the construction contended for by the defendant is correct an auction sale of miso and soyo, Japanese sauces, excluding all but Japanese, a sale of books excluding all illiterates, a sale of carriage lamps excluding all who have no carriages, a sale of automobile parts excluding all who do not own or operate automobiles, and a sale of fat steers in lots of twenty-five to ranchers and butchers only, would not be sales at public auction. It seems incredible that such was the intention of the legislature. The statute should be given a reasonable construction, not permitting of easy evasions with no practical lessening of financial results to the auctioneer.

As to the question of unconstitutionality, it is well settled in this jurisdiction that "the legislature in a matter of this kind may

classify or discriminate if the classification or discrimination is
11 based on some reasonable ground which is furnished by population in some instances." *Trust Company* v. *Treasurer*, 19 Haw. 262, 263. See also *Territory* v. *Pottie*, Ib. 99, 104. "Where natural distinctions require discrimination not to discriminate works injustice." *Robertson* v. *Pratt*, 13 Haw. 600. "Absolute equality is of course unattainable; a mere approximate equality is all that can reasonably be expected." Ib. 602. In *Trust Company* v. *Treasurer*, supra, referring to a contention that a statute was unconstitutional which required a license fee of $750 for a banking business in Honolulu, of $500 for Hilo and of $250 for all other parts of the Territory, said: "There is a natural distinction between the different places in this Territory where banking may be carried on. This, of course, allows the legislature to reasonably and fairly classify the amount of the license fee required for banking. Even if the judgment exercised by the legislature in a matter of this kind it is in our opinion unwise or perhaps oppressive, still that is not of itself sufficient to declare that a statute passed pursuant to such judgment violates the equal protection provisions of 'he constitution." The same may be said with reference to the business of auctioneering. The same distinctions exist. The great bulk of the business of the Territory is done in Honolulu. It is not for us to say whether we would make the difference in the amount of license fees in this case as large as the legislature has made it. It is sufficient that we cannot say that the difference is unreasonable or that the statute is unequal or arbitrary in its operation. Our conclusion is that as far as this objection is concerned the statute is valid.

The judgment appealed from is affirmed.

ALFRED S. HARTWELL.
ANTONIO PERRY.

F. W. Milverton, Deputy City and County Attorney (J. W. Cathcart, City and County Attorney with him on the brief), for plaintiff.

R. P. Quarles (A. L. C. Atkinson with him on the brief) for defendant.

12 *Dissenting Opinion of Wilder, J.*

It appears from the agreed facts that defendant as an agent of the Hawaiian Fisheries Co. Ltd., a domestic corporation engaged in handling and selling on commission for a large number of fishermen fish caught by such fishermen, offered for sale fish in basket lots, each basket containing from seventy to one hundred pounds, to the highest bidder among thirty-three retail dealers of fish or owners of fish tables at the fish market, no bids being received from any other persons. It is well settled that the highest bona fide bidder of those who care to bid at an auction sale is entitled to receive the goods offered for sale. As stated in Bouvier's law dictionary, "A public sale is one made at auction to the highest bidder," and that "an auction is a public sale of property to the 'highest bidder." In

this case it appears that the bidding was limited to about thirty-three persons and that bids from other persons, even if higher than any made by any one of the thirty-three, would not have been received or accepted. It follows, therefore, that this was not a sale to the highest bidder from among those who might choose to bid and consequently there was no sale at auction for which a license is necessary under the statute. The statement in Black's law dictionary applies, namely, that "if there can be such a thing as a private auction it must be one when the property is sold to the highest bidder but only certain persons or a certain class of persons are permitted to be present or to offer bids". The point to determine is not what the legislature actually intended but what its intention was as disclosed by the statute.

The argument made on behalf of plaintiff that the contention of defendant if upheld would only invite evasions of the law as, for instance, an auction sale where bids are received from all persons except hackmen, is without merit, as it does not necessarily follow that in case of the instance cited, which would be simply a scheme to evade the law, the same result would be reached. In this
13 case, notwithstanding the intimation of the majority to the contrary, there is nothing to suggest, and the agreed facts do not permit the inference, that the method pursued in selling the fish was devised simply to evade the statute relating to the licensing of auctioneers, as it appears that defendant's principal is at present operating under a merchandise broker's license.

For the foregoing reasons I therefore dissent from the majority.

A. A. WILDER.

Endorsed: No. 455. Supreme Court Territory of Hawaii. October Term 1909. Territory of Hawaii v. Toyota. Opinion. Filed December 1, 1909, 2:20 P. M. J. A. Thompson, Clerk.

14 In the Supreme Court of the Territory of Hawaii.

Appeal on Points of Law from District Court of Honolulu.

TERRITORY OF HAWAII, Plaintiff,
v.
TOYOTA, Defendant.

Decision on Appeal.

In the above entitled cause the judgment of the District Court of Honolulu appealed from is affirmed pursuant to the opinion of the Court filed in said cause on the 1st day of December, A. D. 1909.

By the Court:

J. A. THOMPSON, *Clerk.*

II.

Dated at Honolulu, this 17th day of January, A. D. 1910.

Endorsed: No. 455. Supreme Court, Territory of Hawaii. Territory of Hawaii, Plaintiff, v. Toyota, Defendant. Decision on Appeal. Filed January 17, 1910, at 11:20 A. M. J. A. Thompson, Clerk.

15 In the Supreme Court of the Territory of Hawaii.

TOYOTA, Appellant,
vs.
TERRITORY OF HAWAII, Respondent.

Petition for Writ of Error.

To the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii:

The petition of Toyota, plaintiff in error, respectfully shows:

That heretofore to wit, October 9th, 1909, there was tried in the District Court of the City and County of Honolulu, in the Territory of Hawaii, a criminal case in which the Territory of Hawaii was plaintiff and your petitioner was defendant.

Your petitioner shows that the criminal-complaint in the said case, and upon which your petitioner was tried, charged your petitioner, as defendant, with having "unlawfully and wilfully engaged in carrying on a certain business, to wit: Auctioneering without first obtaining a license for the carrying on the said business, contrary to section 1331 of the Revised Laws of Hawaii."

Your petitioner shows that the said case was submitted in the said District Court upon a stipulation of facts, which stipulation is of record in said case.

Your petitioner shows that the said District Court for the District of Honolulu, gave judgment against your petitioner on the 9th day of October, 1909, and sentenced your petitioner to pay a fine of six hundred dollars, and the costs of the action.

Your petitioner shows that on the 9th day of October, 1909, your petitioner gave notice of appeal from said judgment of the said district court of Honolulu against him to the Supreme Court of the Territory of Hawaii, upon questions of law stated in his said notice of appeal, as follows:

16 "1. The District Court erred in adjudging that the de-
"fendant is, under the stipulated facts in the case, guilty of
"conducting an auction without a license, as charged.

"2. The court erred in holding that section 1343 Revised Laws
"of Hawaii is valid, the same being in contravention to the Four-
"teenth Amendment to the Constitution of the United States in
"that it denies the equal protection of the laws to the defendant,
"said statute being unconstitutional and void in that it discriminates
"between the residents and citizens of the Honolulu Taxing Dis-
"trict and those of all other taxing districts in the Territory of
"Hawaii."

Your petitioner did, on the said 9th, day of October, 1909, perfect

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his said appeal from said judgment against him to the said Supreme Court of the Territory of Hawaii.

Your petitioner further shows that his said appeal was duly heard in the said Supreme Court of the Territory of Hawaii, and that thereafter and on the 17th, day of January, 1910, judgment was duly entered in the said Supreme Court of the Territory of Hawaii affirming the said judgment of the said district court of the District of Honolulu.

Your petitioner further shows that the said judgment of the said Supreme Court of the Territory of Hawaii affirming the said judgment of the District Court of the District of Honolulu, was, and is, a final judgment in the highest Court of the Territory of Hawaii in which a decision in said case could or can be had, and that in said final judgment and the proceedings had prior thereunto in this case certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Your petitioner further shows that a federal question was made in said case, as hereinbefore shown, and that said judgment of said Supreme Court was, and is, repugnant to and in conflict with the Fourteenth Amendment of the Constitution of the United States, and that said judgment was contrary thereto, and that a decision of the said federal question was necessary thereto.

17 Wherefore, the said Toyota, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said Supreme Court of the Territory of Hawaii in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the said Supreme Court of the Territory of Hawaii be reversed, annulled, and for naught esteemed, and the said cause be remanded to the proper court below with instructions to set aside the judgment against the plaintiff in error, and discharge him without day, and for such further proceedings in said cause as may be determined upon by this honorable court, to the end that full justice may be done in the premises.

TOYOTA, *Plaintiff in Error,*
By ATKINSON & QUARLES,
His Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 21st Day of March, A. D. 1910, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of $1000.

Dated at Honolulu, Territory of Hawaii, this the 21st day of March, A. D. 1910.

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court
[SEAL.] *of the Territory of Hawaii.*

Filed in my office this the 21st of March, A. D. 1910.
J. A. THOMPSON,
Clerk of the Supreme Court of the
Territory of Hawaii.

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Endorsed: No. 455. The Supreme Court of the Territory of Hawaii. Toyota, Plaintiff in Error vs. Territory of Hawaii, Defendant in Error. Petition for Writ of Error. Filed March 21, 1910 at 3:10 o'clock P. M. J. A. Thompson, Clerk.

18 *Bond on Writ of Error.*

Know all men by these presents that we, Toyota, as principal, and T. Mitamura and G. Nakamura as sureties, are held and firmly bound unto the Territory of Hawaii, in the sum of One Thousand Dollars, ($1000.00), to be paid to the said obligee, its successor, representative, and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 21st Day of March A. D. 1910.

Whereas the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the Territory of Hawaii.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

TOYOTA.
T. MITAMURA.
G. NAKAMURA.

Signed, sealed and delivered in presence of
RALPH P. QUARLES.
D. K. KAEO.

19 TERRITORY OF HAWAII,
First Judicial Circuit, ss:

On this 21st day of March, 1910, before me, personally appeared Toyota, known to me to be the person described in and who executed the foregoing bond, and acknowledged that he executed the same as his free act and deed.

D. K. KAEO,
Notary Public, First Judicial Circuit,
Territory of Hawaii.
[SEAL.]

TERRITORY OF HAWAII,
First Judicial Circuit, ss:

On this the 21st day of March, A. D. 1910, personally appeared before me, T. Mitamura and G. Nakamura, who being duly sworn, each for himself, deposes and says; that he signed the above and foregoing bond, as surety; that he is a resident house-holder in

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the District of Honolulu, Territory of Hawaii, and is worth the sum in the said bond specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

T. MITAMURA.
G. NAKAMURA.

Subscribed and sworn to before me this 21st day of March, 1910.

D. K. KAEO,
Notary Public, First Judicial Circuit, Territory of Hawaii.
[SEAL.]

I hereby approve the foregoing bond and sureties this 21st day of March, A. D. 1910.

[SEAL.] ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

O. K.
E. W. SUTTON,
Deputy Attorney General.

Endorsed: No. 455. The Supreme Court of the Territory of Hawaii. Toyota, Plaintiff in Error vs. Territory of Hawaii, Defendant in Error. Bond on Writ of Error. Filed March 21, 1910, at 3:10 o'clock P. M. J. A. Thompson, Clerk.

20 The Supreme Court of the Territory of Hawaii.

TOYOTA, Plaintiff in Error,
vs.
TERRITORY OF HAWAII, Defendant in Error.

Assignment of Errors.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the Territory of Hawaii, in the above entitled matter there is manifest error in this, towit:

First. The Court erred in holding that section 1343 of the Revised Laws of the Territory of Hawaii, in the following words and figures, to wit:

"SEC. 1343. Fee. The annual fee for a license to sell goods, wares and merchandise or other property at auction, shall be six hundred dollars for the district of Honolulu, and fifteen dollars for each other taxation district."

was, or is valid, and not contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the Territory of Hawaii, by and through the provisions of the said section 1343 of the Revised Laws of Hawaii assures and seeks,

1, to impose upon the plaintiff in error and all other persons en-

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gaged in the business of auctioneer in the district of Honolulu, a burden not imposed upon persons engaged in the same business in all other taxation districts in the said Territory of Hawaii;

2, the said statute makes an arbitrary classification of persons engaged in the business of auctioneer within the Territory of Hawaii, and said classification is not upon any well defined or recognized lines, is not based upon amount or volume of business done by persons engaged in the business of auctioneer, nor upon the population of the various taxation districts in the Territory of Hawaii, but same is purely arbitrary and unreasonable;

3, the said section 1343 imposes an inequality of burden
21 upon the persons engaged in the business of auctioneer in the several taxation districts of the Territory of Hawaii, and denies to the defendant the equal protection of the laws,

4, the said section 1343 Revised Laws of Hawaii takes from the defendant his property without due process of law.

Second. The court erred in holding that the facts stipulated constituted an auction within the purview of sections 1331, 1343, 1345 of the Revised Laws of the Territory of Hawaii, in that the facts stipulated show a sale of fish to retail dealers only, and not to the public, and are not sufficient to constitute a sale at public auction with- the meaning and intent and operations of the said statutes.

Third. The court erred in affirming the judgment of the district court of Honolulu against the defendant, to his prejudice and contrary to law.

ATKINSON & QUARLES,
Attorneys for Plaintiff in Error.

22 [Endorsed:] No. 455. The Supreme Court of the Territory of Hawaii. Toyota, Plaintiff in Error, vs. Territory of Hawaii, Defendant in Error. Assignment of error. Filed March 21, 1910, at 3:10 o'clock P. M. J. A. Thompson, Clerk.

23 UNITED STATES OF AMERICA, *ss:*

To the Territory of Hawaii, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Toyota is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii, this 21st day of March, A. D. 1910.

[Seal Supreme Court, Territory of Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court
of the Territory of Hawaii.

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Copy of the above and foregoing citation received this 21st day of March, A. D. 1910, at the office of the Attorney General of the Territory of Hawaii.

E. W. SUTTON,
Deputy Attorney General.

24 [Endorsed:] No. 455. The Supreme Court of the Territory of Hawaii. Toyota, Plaintiff in Error, vs. Territory of Hawaii, Defendant in Error. Citation to defendant in error. Filed and issued for service March 21, 1910, at 3:30 P. M. J. A. Thompson, Clerk. Returned March 22nd, 1910, at 10:10 A. M. J. A. Thompson, Clerk.

25 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the Supreme Court of the Territory of Hawaii, before you, or some of you, being the highest court of law or equity of the said Territory in which a decision could be had in the said suit between the Territory of Hawaii and Toyota wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said Territory, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Toyota, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 18th day of May, A. D. 1910, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said

Supreme Court, the 21st day of March, in the year of our Lord one thousand nine hundred and ten.

Attest:

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed by

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

26 [Endorsed:] No. 455. The Supreme Court of the Territory of Hawaii. Toyota, Plaintiff in Error, vs. Territory of Hawaii, Defendant in Error. Writ of Error. Filed March 22, 1910, at 4:10 o'clock P. M. J. A. Thompson, clerk.

27 In the Supreme Court of the Territory of Hawaii, October Term, 1909.

No. 455.

THE TERRITORY OF HAWAII, Plaintiff,
vs.
TOYOTA, Defendant.

Appeal from District Magistrate of Honolulu.

Certificate of Clerk to Transcript of Record.

TERRITORY OF HAWAII,
City and County of Honolulu, ss:

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the petition of Toyoto for a writ of error and in obedience to a writ of error filed herein, do hereby certify that the foregoing pages numbered from 1 to 14 inclusive, contain a true and complete transcript of record and proceedings had in the above entitled court in the case entitled "Territory of Hawaii, Plaintiff, versus Toyota, Defendant," as the same remain of record and on file in my office.

I further certify that the foregoing pages numbered from 15 to 19 inclusive contain true and correct copies of the "Petition for a Writ of Error" and "Bond on Writ of Error" and that the original "Assignment of Errors" the original "Citation to Defendant in Error and acceptance of service thereof" and the original "Writ of Error and allowance thereof" are attached hereto and herewith returned.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, this 24th

day of March, A. D. 1910, at my Office in Honolulu City and County of Honolulu.

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 22,149. Hawaii Territory Supreme Court. Term No. 923. Toyota, plaintiff in error, vs. The Territory of Hawaii. Filed May 9th, 1910. File No. 22,149.

5

Office Supreme Court, U. S.
FILED.
OCT 24 1910
JAMES H. McKENNEY,
CLERK.

BRIEF FOR PLAINTIFF IN ERROR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. [redacted] 49

TOYOTA, PLAINTIFF IN ERROR,

vs.

THE TERRITORY OF HAWAII.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

D. W BURCHARD, Attorney for Plaintiff in Error.

A. L. C. ATKINSON and RALPH P. QUARLES, of Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1910

TOYOTA,
PLAINTIFF IN ERROR,

vs.

TERRITORY OF HAWAII,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR PLAINTIFF IN ERROR (DEFENDANT BELOW).

D. W. BURCHARD,
Attorney for the Plaintiff in Error.

A. L. C. ATKINSON and RALPH P. QUARLES,
of Counsel for Plaintiff in Error.

STATEMENT OF THE CASE.

The defendant was arrested on a warrant which issued upon a criminal complaint filed in the District Court of Honolulu, in the Territory of Hawaii, upon the charge of unlawfully and wilfully engaging in carrying on the business of auctioneer without first obtaining a license to carry on such business, contrary to Section 1331 of the Revised Laws of Hawaii, was arraigned, pleaded not guilty, and placed upon trial. At the trial the facts were stipulated as follows:

"In the above cause the facts are stipulated as follows, to wit:

That the Hawaiian Fisheries, Limited, is a domestic corporation, organized under the laws of Hawaii, and doing business at Honolulu.

That said corporation handles and sells for a large number of fishermen, on commission, fish caught by such fishermen, and does so daily, in the following manner:

The catch as soon as it comes in by boat is loaded into wagons and carried to the Fish Market, in Honolulu, and there an agent of said Hawaiian Fisheries offers it in basket lots, each basket containing about from 70 to 100 pounds, to the retail dealers of fish only, and the one bidding the highest price for same there and then becomes the purchaser. That at such sales no bid is received except from such retail dealers, or the persons conducting fish tables on the said market. That fish is highly perishable, and must be quickly disposed of after being brought to market, and that the above plan is followed to facilitate the sale of fish when brought to market. The said corporation, if it cannot sell the fish brought to market in the manner above indicated, then must, under contract with the fishermen who are its patrons, sell such fish at retail. That the defendant was at the time and place stated in the complaint against him, as agent for said corporation, selling and offering for sale, fish in basket lots, in the manner above indicated, and not otherwise. That there are about 33 proprietors of fish tables on said market, who with their assistants buy fish from said corporation, in manner as above

stated. Neither the defendant, nor the said Hawaiian Fisheries Company, Limited, has obtained a license as Auctioneer, in and for the City and County of Honolulu, for the fiscal year commencing July first, 1909, or any part of said year. That the said Hawaiian Fisheries Company, Limited, has obtained and been operating under a Merchandise Brokers' License, and now has such license." (See Record, pages 1 and 2.)

Section 1331 of the Revised Laws of Hawaii, mentioned in the complaint and warrant is in words and figures as follows, to wit:

"Sec. 1331. **Penalty unless otherwise prescribed.** Any person or persons who shall engage in or carry on any business, or do any act enumerated in this chapter, the engaging in or doing which is therein required to be licensed, without first obtaining a license issued in conformity with the provisions thereof; or who shall sell any goods, wares, merchandise, produce or thing of value, contrary to the terms of this chapter; or who shall violate or fail to observe any of the provisions of this chapter, shall be guilty of a misdemeanor, and upon conviction shall, unless otherwise in this chapter provided, be fined a sum not less than the annual fee, and not more than twice the annual fee in this chapter prescribed for the carrying on of such business, or the doing of such act."

Sections 1343, 1344, and 1345, Revised Laws of Hawaii, relating to auctioneers, are in words and figures as follows, to wit:

"Sec. 1343. **Fee.** The annual fee for a license to sell goods, wares and merchandise or other property at auction, shall be six hundred dollars for the district of Honolulu, and fifteen dollars for each other taxation district."

"Sec. 1344. **Record Books.** Every auctioneer shall keep and preserve a record book in which shall be entered:

1. A detail list and description of the property received for sale;
2. The name of the person from whom, or on account of whom the same is received;
3. The date upon which the same is received;
4. The date upon which the same is sold;
5. The price for which each article is sold;

6. The name of the person or persons to whom each article is sold; which record shall, during the regular business hours be open to the inspection of any person desiring to see the same. Every such entry shall be made immediately after each transaction required to be recorded."

"Sec. 1345. **Bond.** Every person upon receiving an auction license, shall give a bond to the treasurer in the penal sum of three thousand dollars, if the license is for the district of Honolulu, and in the penal sum of five hundred dollars for other districts, with good and sufficient surety or sureties to be approved by the treasurer, conditioned:

1. That he will faithfully and truly keep the records by section 1344 required to be kept;

2. That he will faithfully, promptly and truly account to all persons for whom he may sell property, and promptly pay to them all sums received by him for sales of the same, after deducting therefrom his commissions and expenses;

3. That he will not sell goods, wares, merchandise or other property, except at public auction;

4. That he will otherwise in all things conform to the laws relating to auctioneers."

October 9th, 1909, the case was submitted to the said District Court upon said stipulation of facts, there being no dispute as to any fact involved, whereupon said District Court found the defendant below, plaintiff in error here, guilty of violating section 1344 Revised Laws, and sentenced him to pay a fine of six hundred dollars and the costs, one dollar. Thereupon the said defendant, plaintiff in error here, took an appeal direct to the Supreme Court of the Territory of Hawaii from said judgment, upon questions of law stated in the notice of appeal (see Record, folio 6) as follows:

"1. The District Court erred in adjudging that the defendant is, under the stipulated facts in the case, guilty of conducting an auction without a license, as charged. 2. The Court erred in holding that section 1343, Revised Laws of Hawaii, is valid, the same being in contravention of the Fourteenth Amendment to the Constitution of the United States in that it denies the equal protection of the laws to the defendant,

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said statute being unconstitutional and void in that it discriminates between the residents and citizens of Honolulu Taxing District and those of all other taxing districts in the Territory of Hawaii."

The said appeal was heard in said Supreme Court on the 8th day of November, 1909, and on the first day of December, 1909, the said Supreme Court rendered its decision affirming the said judgment of said District Court. (See Record, pages 4 to 8 inclusive.)

Thereafter, and on the 17th day of January, 1910, the said Supreme Court rendered its decision duly affirming said judgment so appealed from, which judgment was then duly entered. (See Record, page 8.)

Thereafter, and in the month of March, 1910, the plaintiff in error filed his petition in error, and assignments of error, and obtained a writ of error and citation of error and executed the required bond, which citation and writ were regularly served. (See Record, pages 9 to 15 inclusive.)

ERRORS ASSIGNED.

The first error assigned attacks the constitutionality of the Hawaiian statute imposing the license tax in question (Rev. Laws, 1343) upon various grounds, stated in the assignment of error (Record, pages 12, 13) as follows:

"The Court erred in holding that section 1343 of the Revised Laws of the Territory of Hawaii, in the following words and figures, to wit:

"Sec. 1343. Fee. The annual fee for a license to sell goods, wares and merchandise or other property at auction, shall be six hundred dollars for the district of Honolulu, and fifteen dollars for each other taxation district,"

was or is valid, and not contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the Territory of Hawaii, by and through the provisions of the said section 1343 of the Revised Laws of Hawaii assumes and seeks,

1, to impose upon the plaintiff in error and all other persons engaged in the business of auctioneer in the district of Hono-

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lulu, a burden not imposed upon persons engaged in the same business in all other taxation districts in the said Territory of Hawaii;

2, the said statute makes an arbitrary classification of persons engaged in the business of auctioneer within the Territory of Hawaii, and said classification is not upon any well defined or recognized lines, is not based upon amount or volume of business done by persons engaged in the business of auctioneer, nor upon the population of the various taxation districts in the Territory of Hawaii, but the same is purely arbitrary and unreasonable;

3, the said section 1343 imposes an inequality of burden upon the persons engaged in the business of auctioneer in the several taxation districts of the Territory of Hawaii, and denies to the defendant the equal protection of the laws,

4, the said section 1343 Revised Laws of Hawaii takes from the defendant his property without due process of law."

The second error assigned (Record, page 13) attacks the judgment upon the ground that the stipulated facts do not show an auction sale, hence the judgment is unsupported by the evidence.

ARGUMENT.

The power of the Legislature of Hawaii under the Organic Act to license the occupation of auctioneer is conceded. Its power to do so by a law like that in question here, where auctioneers in the Territory are classified arbitrarily, with regard to locality, and with utter disregard to amount of population or amount of business done, is denied. In the case of Trust Co. vs. Treasurer, decided by the Supreme Court of Hawaii, and reported in 19 Hawn. 262, the Court judicially determined the numerical population of the various taxing districts, as follows: Honolulu, almost 40,000; Hilo, almost 20,000, and all others less than Hilo. The numerical population of these districts is a part of the history of the Territory, and it was the duty of the District Court and of the Supreme Court to take judicial notice of the same. In the case of Trust Co. v. Treasurer, *supra*, the statute in question provided a banking license in Honolulu of $750, Hilo $500, and in all other places

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$250. The Court held the classification made by the statute to be a reasonable one, on the idea that the population was about twice as much in Honolulu as in Hilo. The statute there involved provided a license tax twice as great in Hilo as in other places, and fifty per cent more in Honolulu than in Hilo. But the tax in question here cannot be sustained upon such basis, for instead of providing a license tax for Honolulu fifty per cent greater than that of Hilo, it has provided one forty times as great, the tax in Honolulu being $600 and in Hilo $15. In the absence of any showing to the contrary the presumption is that these different districts so far as the occupation in question is concerned, do a volume of business proportionately to their respective population.

The objections to the statute in question that it imposes a burden upon the plaintiff in error and others engaged in the occupation of auctioneer in the district of Honolulu unequal to that imposed upon others engaged in the same occupation in other districts; that it denies the equal protection of the law to the plaintiff in error and others engaged in auctioneering in Honolulu; that it takes from the plaintiff in error his property without due process of law, we respectfully submit, are well taken.

We regard it as unnecessary to suggest to this Court the principles involved, the rules applicable, or the reasoning upon which such rules are based. We will content ourselves with citations which we deem may have some application, feeling that this Court is perfectly familiar with the authorities:

That the objections urged against the statute in question are well taken, we cite the following authorities:

Ho Ah Kow v. Nuan, Fed. Cas. 6546;
State v. Mitchell, 97 Me. 66;
State v. Shedroi, 75 Vt. 277;
Ex Parte Deeds (Ark.) 87 S. W. Rep. 1030;
In re Yot Sang, 75 Fed. Rep. 983;
Re Cope's Estate, 191 Pa. 1;
Barbier v. Connelly, 113 U. S. 27;
Soon Hing v. Crowley, 113 U. S. 704;
Ex Parte Jentsch, 112 Cal. 468;
Luman v. Hutchins Bros., 90 Md. 14;

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Evansville v. State, 118 Ind. 426;
State v. Cadigan, 73 Vt. 245;
State v. Wiggin, 64 N. H. 508;
Sayre v. Phillips, 148 Pa. 482;
State ex rel. Hoadley v. Board Ins. Coms., 37 Fla. 564;
Rossmiller v. State, 114 Wis. 169;
Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150;
State v. Loomis, 115 Mo. 307;
Stratton v. Morris, 89 Tenn. 497;
Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 232;
Territory v. McDonald, 17 Hawn. 389;
South and North Ala. R. Co. v. Morris, 65 Ala. 193;
Chicago, St. L. & N. C. R. Co. v. Moss, 60 Miss. 641;
St. Louis, etc., R. Co. v. Williams, 49 Ark. 492;
Jollife v. Brown, 14 Wash. 155;
Grand Rapids Chair Co. v. Runnels, 77 Mich. 104;
San Antonio & A. P. R. Co. v. Wilson (Tex.) 19 S. W. Rep. 910;
Atchison & N. R. Co. v. Baty, 6 Neb. 37;
Yick Wo v. Hopkins, 118 U. S. 356;
Dobbins v. Los Angeles, 195 U. S. 223;
San Mateo v. Southern Pac. R. Co., 13 Fed. Rep. 722;
Santa Clara v. Southern Pac. R. Co., 118 U. S. 394;
Territory v. Pottie, 19 Hawn. 99;
Raymond v. Chicago Traction Co., 207 U. S. 20;
Seaboard A. & R. Co. v. Simmon (Fla.), 47 So. Rep. 1001;
Off v. Morehead, 235 Illinois 40;
Cooley Const. Lim. 4th Edition, pp. 744-745;
Cooley on Taxation, 2nd Edition, 169-170.

The statute in question, because of its discriminating nature, the imposition by it of burdens upon some which are not placed upon others, violates the letter and spirit of section 55 of the Organic Act creating the Territory of Hawaii, in that it exempts individuals outside of Honolulu from a burden placed upon the residents of Honolulu.

The plaintiff in error submits that the second error assigned to the effect that the stipulated facts do not show a public auction within the purview of the statute in question, is well taken.

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The language of the statute contemplates a public auction. The word public is not used in section 1343, nor in section 1344, but in section 1345 prescribes a bond to the effect that the auctioneer "will not sell goods," etc., "except at public auction." The statute being penal must be strictly construed.

Wharton's Crim. Law, Tenth Edition, § 28;
Clark's Crim. Law, Second Edition, page 31.

The question then arises, "Did the Legislature intend by the word "auction" in the statute a "public" auction or one made in the usual way? Construing the different sections together, and bearing in mind that the auctioneer must give bond that he will not sell goods, etc., except "at public auction," the conclusion seems irresistible that the statute intended a public auction. We now come to the question, "Do the stipulated facts show a public auction?"

Black's Law Dictionary defines the word "auction" as follows:

"A public sale of lands or goods, at public outcry, to the highest bidder."

The same authority defines the word "auctioneer" as follows:

"A person authorized or licensed by law to sell land or goods of other persons at public auction; one who sells at auction."

The usual way of making an auction sale is as follows:

"The fact that the sale is to be held, the particulars of the property and the time and place of the sale, are advertised in the newspapers or by hand bills (in some places the public crier) or in both ways. At the time and place appointed, the auctioneer from his desk or rostrum, reads aloud the conditions upon which the property will be transferred to the highest bidder, and invites those present to bid. Thereupon those desirous of purchasing bid, one after the other, each succeeding offer being higher than the preceding one, and the bidding being called by the auctioneer. The highest bidder is declared the purchaser, the acceptance of his offer being signified to the company present by the auctioneer striking his desk with a small portable hammer; whence the auctioneer is said to knock down the property to the buyer."

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Bateman on Auctions, pp. 1, 2.

Mr. Black, in his Law Dictionary, speaking of a "public auction," says:

"Though this phrase is frequently used, it is doubtful whether the word 'public' adds anything to the force of the expression, since 'auction' itself imports publicity. If there can be such a thing as a private auction, it must be one when the property is sold to the highest bidder, but only certain persons, or a certain class of persons, are permitted to be present or to offer bids."

The stipulated facts show that the sale of fish was not to the highest bidder, but that the bids were confined to one class of persons, namely, the retail dealers of fish, and that the general public were excluded. Hence, under the very definition of auction, and of public auction, and Mr. Black's description or definition of a private auction, the stipulated facts show that there was no public auction, such as is contemplated by the statute, but on the other hand, a private sale or auction, which was not intended to be covered by the statute. This contention, we think, is clear when we keep in mind the meaning of the word "public." The word "public" is defined by the Standard Dictionary as "open to all; maintained by or for the public."

Black's Law Dictionary defines "public" thus:

"Pertaining to a state, nation or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious; common to all or many; general; open to common use.

In 1 Greenleaf on Evidence, §128, it is said:

"A distinction has been made between the terms 'public' and 'general.' They are sometimes used as synonymous. The former term is applied strictly to that which concerns all the citizens and every member of the state; while the latter includes a lesser, though still a large portion of the community."

We respectfully submit that section 1343 of the Revised Laws of Hawaii, which imposes upon persons engaged in the occupation of auctioneer in the district of Honolulu a

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license forty times as great as in Hilo and other districts within the Territory of Hawaii, violates the Fifth Amendment to the Constitution in that it takes from such person his property without due process of law, and violates the Fourteenth Amendment in that it makes an arbitrary classification and discriminates between persons engaged in the same occupation in the Territory of Hawaii, and denies to the plaintiff in error the equal protection of the law.

But, if this Honorable Court should not agree with us as to the validity of said statute, then we earnestly submit that the stipulated facts do not, within the purview of the statute, constitute an offense in that the said acts do no show that the plaintiff in error conducted a *public auction.*

We respectfully ask that the judgment of the Supreme Court of the Territory of Hawaii be reversed.

Respectfully submitted,

D. H. Burchard,

Attorney for Plaintiff in Error.

A. L. C. ATKINSON and
RALPH P. QUARLES,
of Counsel for Plaintiff in Error.

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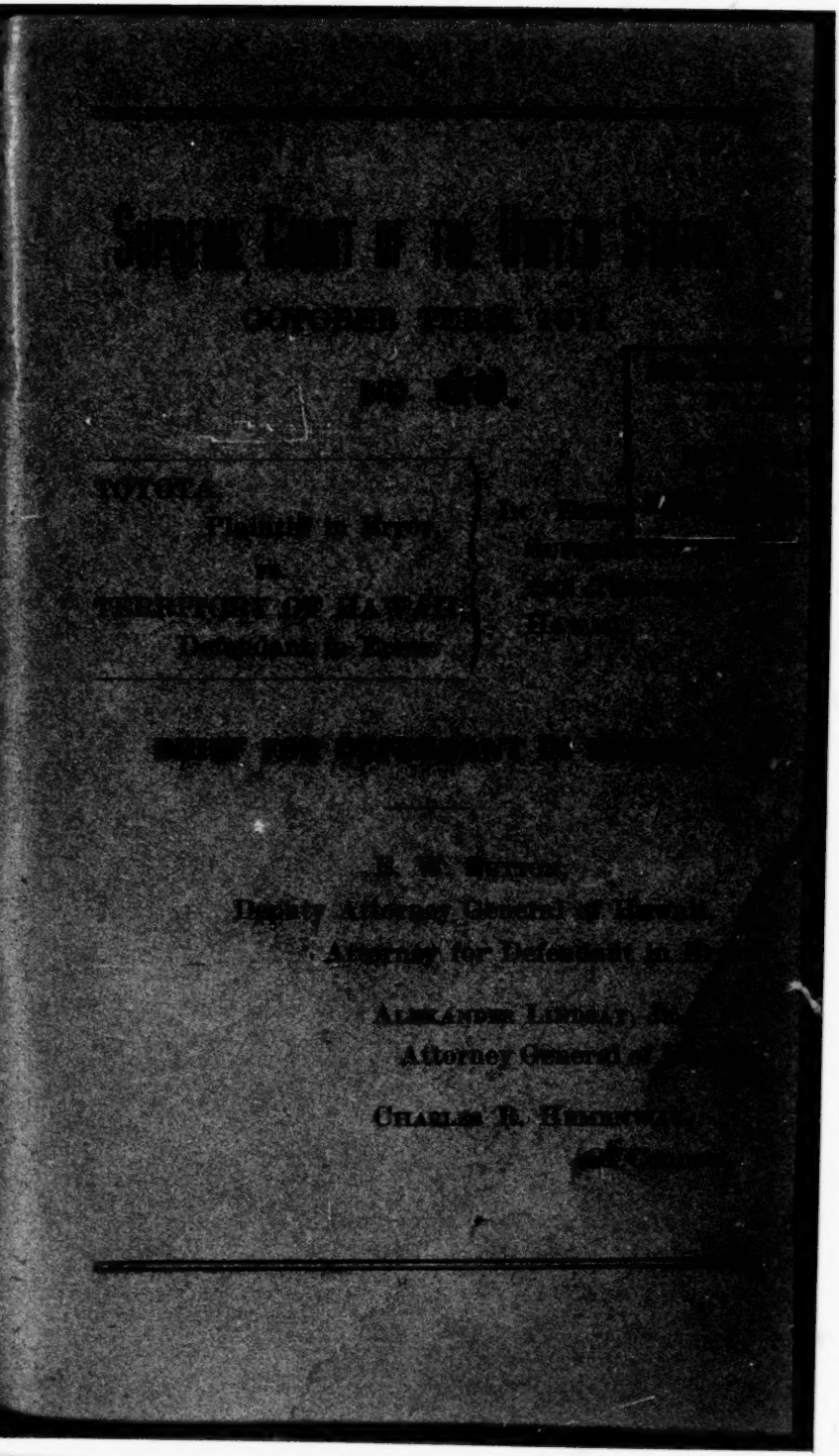

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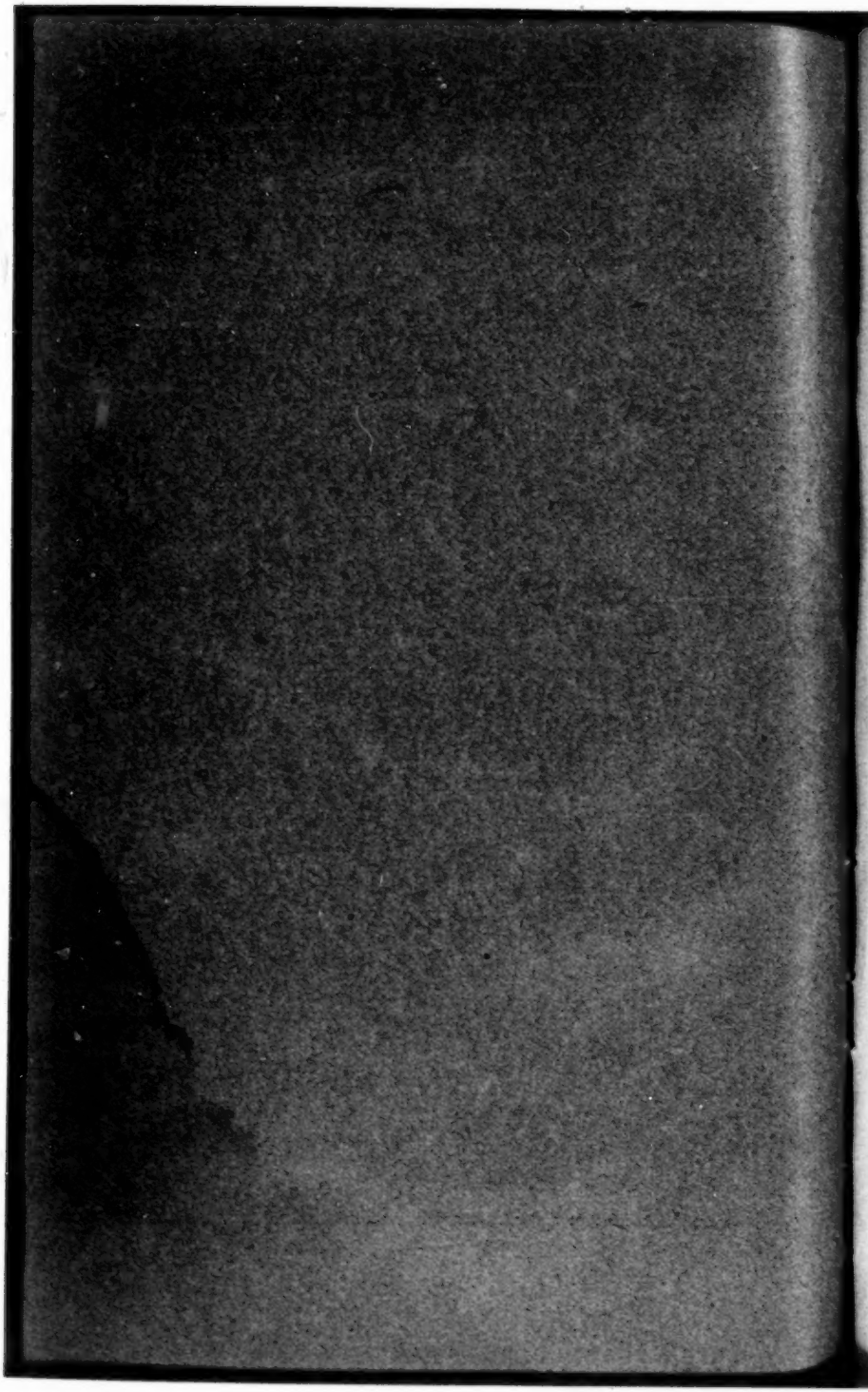

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911

No. 273

TOYOTA, Plaintiff in Error, vs. TERRITORY OF HAWAII, Defendant in Error.	IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE.

The plaintiff in error, Toyota, was charged and tried in the District Court of Honolulu, Territory of Hawaii, for the offense of carrying on the business of an auctioneer in the District of Honolulu without having a license so to do, contrary to the provisions of Section 1343 of the Revised Laws of Hawaii, which provides as follows:

"The annual fee for a license to sell goods, wares and merchandise or other property at auction shall be Six Hundred Dollars for the District of Honolulu, and Fifteen Dollars for each other Taxation District."

The facts constituting the offense were agreed upon and are, briefly, as follows: A corporation engaged

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in selling fish on commission employed the defendant Toyota to sell its fish at the Fish Market in Honolulu, in basket lots averaging from 70 to 100 pounds. None but retail dealers in fish were allowed to bid for the lots of fish—and these were auctioned off to the highest bidder. Neither Toyota nor the corporation which employed him had obtained an auctioneer's license at the time of the sale (See Record, pp. 1, 2).

The defendant contended in the District Court that under these facts he was not guilty of conducting an aution, basing this contention on the fact that the bidding for the lots of fish was not open to the general public but was limited to the retail dealers in fish. Defendant also contended that Section 1343 of the Revised Laws of Hawaii denied him the equal protection of the law because it discriminated between residents of the District of Honolulu and the residents of the other taxation districts of the Territory of Hawaii, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

These contentions were overruled by the District Magistrate and the defendant Toyota was convicted of the offence charged and sentenced in accordance with the provisions of Section 1331 of the Revised Laws of Hawaii, to pay a fine of six hundred dollars and the costs of court.

On appeal to the Supreme Court of Hawaii the judgment of the District Court was affirmed (Record pp. 4 to 8). The action of the Supreme Court of Ha-

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waii is brought to the Supreme Court of the United States for review, by a writ of error duly perfected (Record pp. 9 to 16). The following are the assignments of error:

First: The Court erred in holding that Section 1343 of the Revised Laws of the Territory of Hawaii, in the following words and figures, to wit:

"Sec. 1343. Fee. The annual fee for a license to sell goods, wares and merchandise or other property at auction, shall be six hundred dollars for the district of Honolulu, and fifteen dollars for each other taxation district."

was or is valid, and not contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the Territory of Hawaii, by and through the provisions of the said Section 1343 of the Revised Laws of Hawaii assures and seeks

(1) to impose upon the plaintiff in error and all other persons engaged in the business of autioneer in the District of Honolulu, a burden not imposed upon persons engaged in the same business in all other taxation districts in the said Territory of Hawaii;

(2) the said statute makes an arbitrary classification of persons engaged in the business of auctioneer within the Territory of Hawaii, and said classification is not upon any well defined or recognized lines, is not based upon amount or volume of business done by persons engaged in the business of auctioneer, nor upon the population of the various

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taxation districts in the Territory of Hawaii, but same is purely arbitrary and unreasonable;

(3) the said Section 1343 imposes an inequality of burden upon the persons engaged in the business of auctioneer in the several taxation districts of the Territory of Hawaii, and denies to the defendant the equal protection of the laws;

(4) the said Section 1343, Revised Laws of Hawaii, takes from the defendant his property without due process of law.

Second. The court erred in holding that the facts stipulated constituted an auction within the perview of Sections 1331, 1343, 1345 of the Revised Laws of the Territory of Hawaii, in that the facts stipulated show a sale of fish to retail dealers only, and not to the public, and are not sufficient to constitute a sale at public auction within the meaning and intent and operations of the said statutes.

Third. The court erred in affirming the judgment of the District Court of Honolulu against the defendant, to his prejudice and contrary to law.

ARGUMENT.

An examination of the record in this case shows that in the District Court of Honolulu and in the Supreme Court of Hawaii, but two questions were raised: first, that the sale conducted by the defendant Toyota was not an "auction" within the meaning of the statute; and, second, that the law requiring

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an auctioneer's license violated the provision of the 14th Amendment to the Constitution of the United States prohibiting the States from denying persons the "equal protection of the law" because it discriminated between residents of the District of Honolulu and residents of the other taxation districts of the Territory. The decision of these points is assigned as error, but in addition to these plaintiff, in his assignment, contends that Section 1343 of the Revised Laws of Hawaii deprives him of his property without due process of law. This contention was not made either in the trial court or in the Supreme Court of Hawaii, but appears for the first time in the assignment of errors. The rule seems to be well established that questions not raised in the trial court will not be noticed on appeal. *Walker v. Saurinet*, 92 U. S. 90; 23 L. ed. 678; cases cited in note to 2 Cyc. 661. Consequently this brief will be confined to the two questions raised in the trial court.

The Hawaiian law requiring a higher license fee for auctioneers in the District of Honolulu than in other taxation districts of the Territory does not constitute arbitrary discrimination and is not contrary to the equal protection clause of the Fourteenth Amendment to the Constitution.

The Supreme Court of Hawaii in its opinion in this case said upon this question as follows:

"As to the question of unconstitutionality, it is well settled in this jurisdiction that: 'The Legislature in a matter of this kind may classify or discriminate if the classification or discrimination is based

upon some reasonable ground, which is furnished by population in some instances.' *Trust Co. v. Treasurer,* 19 Haw. 262, 263. See also *Territory v. Pottie,* Id. 99, 104. 'Where natural distinctions require discrimination, not to discriminate works injustice.' *Robertson v. Pratt,* 13 Haw. 600. 'Absolute equality is, of course, unattainable; and mere approximate equality is all that can reasonably be expected.' Id. 602. In *Trust Company v. Treasurer,* supra, referring to a contention that a statute was unconstitutional which required a license fee of $750.00 for a banking business in Honolulu, of $500.00 for Hilo and of $250.00 for all other parts of the Territory said: 'There is a natural distinction between the different places in this Territory where banking may be carried on. This, of course, allows the Legislature to reasonably and fairly classify the amount of the license fee required for banking. Even if the judgment exercised by the Legislature in a matter of this kind is in our opinion unwise or perhaps oppressive, still that is not in itself sufficient to declare that a statute passed pursuant to such judgment violates the equal protection provisions of the Constitution.' The same may be said with reference to the business of auctioneering. The same distinctions exist. The great bulk of the business of the Territory is done in Honolulu. It is not for us to say whether we would make the difference in the amount of license fees in this case as large as the Legislature has made it. It is sufficient that we cannot say that the difference is unreasonable or that the statute is unequal or arbitrary in its operation. Our conclusion is that as far as this objection is concerned, the statute is valid."

The guarantee of equal protection contained in the 14th Amendment has been considered so many times by our courts that there can be no doubt as to the limitations which it places upon the power of the States. The amendment was designed to prevent laws discriminating against some and favoring

others of the same class—arbitrary and unreasonable discriminations. It was not designed to prohibit the States from enacting laws which classify the objects of taxation so long as the classification is reasonable and all persons within the class are treated alike. Nor was it designed to prevent a State from diversifying its legislation in this regard to meet diversities in situations and conditions within its borders.

Cooley Constitutional Limitations (6th ed.), 479-481;
Giozza v. Tiernan, 148 U. S. 657, 661;
Soon Hing v. Crowley, 113 U. S. 703;
Hayes v. Missouri, 120 U. S. 68, 71;
Home Ins. Co. v. New York, 134 U. S. 594;
Barbier v. Connolly, 113 U. S. 27;
State v. O'Hara, 36 La. Ann. 93;
State v. Schlier, 50 Tenn. 242;
O'Hara v. State, 121 Ala. 28;
Texas Banking Co. v. State, 42 Tex. 636;
East St. Louis v. Wehrung, 56 Ill. 592;
Cargill Company v. Minn., 180 U. S. 452;
Heath & Milligan v. Worst, 207 U. S. 338, 354;
Bachtel v. Wilson, 204 U. S. 36;
Bells Gap. Ry. v. Pa., 134 U. S. 232;
Strange v. Commissioners, 91 N. E. 242 (Ind.);
State v. Mitchell, 97 Me. 66, 70;
Missouri v. Lewis, 101 U. S. 22.

Judged from the principles enunciated in these cases, the Hawaiian statute requiring a higher li-

cense fee for auctioneers in Honolulu than elsewhere is clearly constitutional, for the difference in license fees is based upon a difference not only in population, but in the amount of business transacted in the different places.

In the case of *Trust Company v. Treasurer*, 19 Haw. 262, at 263, the Supreme Court of Hawaii stated that the evidence in that case showed that the population of Honolulu was almost 40,000 and of Hilo almost 20,000, and of all other places in the Territory less than that of Hilo. The plaintiff in error insisted strongly below, and probably will do so in this court, that the license fees if classified at all should be classified strictly in accordance with population and that as the difference in the amount of license fee for conducting the auctioneer's business in Honolulu from what it was in other places was not in accordance with the difference in population that consequently it should be held that the classification was arbitrary. It is, of course, impossible to know what motives prompted the Legislature in making such a marked difference in the rate of charges, but it may well be presumed that what is stated by the Supreme Court of Hawaii to be a fact,—"the great bulk of the business of the Territory is done in Honolulu," as well as the difference in population were duly considered. Whether the judgment of the Legislature as to the amount of difference in the rate of charge was unwise or even possibly oppressive in the opinion of this court, that of itself would not be sufficient cause for declaring the statute passed pursuant

to such judgment violative of the equal protection clause of the Constitution. It is not sufficient ground for holding such a statute unconstitutional that it may possibly be arbitrary and unreasonable, but it must be as a matter of fact actually arbitrary and unreasonable.

Heath and Milligan v. Worst, 207 U. S. 338;
Bachtel v. Wilson, 204 U. S. 36;
Trust Co. v. Treasurer, 19 Haw. 262;
Ozan Lumber Co. v. Union County Bank, 207 U. S. 251;
Magoun v. Ill. Trust and Savings Bank, 170 U. S. 283;
Hayes v. Mo., 120 U. S. 68;
Mo. v. Lewis, 101 U. S. 22.
Clark v. K. C., 176 U. S. 114, 119.

The basis of the classification has been found to be reasonable.

The basis of classification adopted in this instance, requiring a higher license fee for conducting the business of auctioneering in Honolulu than elsewhere in the Territory, is found in numerous laws requiring licenses for conducting other businesses. Such businesses as the following: banking, boatmen, boats for hire, butchering beef, butchering pork, steam laundries, livery stables, garages, notaries public, selling awa, and several others are required to pay higher license fees in Honolulu than elsewhere (Section 1352, Revised Laws of Hawaii as

amended by Act 25 of the Laws of 1907; Sections 1343, 1352, 1357, 1366, 1370, 1375, 1379, 1379A and 1335 of the Revised Laws of Hawaii). Several of these laws have been in force since 1896, without objection having been made with regard to the basis of classification. During this time there have been sessions of the Legislature of Hawaii every two years, so that had the classification in fact been unreasonable and unjust, numerous opportunities were presented to secure the repeal of these laws. It is therefore evident that the Legislature and the people generally have considered such a classification to be reasonable, knowing that the privilege of conducting any business in Honolulu is of greater value than in any other part of the Islands, and consequently such privileges are rightfully required to pay higher license fees in Honolulu than elsewhere.

Moreover, in considering the constitutionality of this auction license law, the unique situation in the Territory of Hawaii must be taken into consideration. Until the year 1905, there were no municipalities, the entire scheme of government being a central one. All laws, whether local or of general application, were enacted by the Legislature either with the approval of the King, in the time of the Kingdom, the President in the time of the Republic and Provisional governments, and the Governor since the creation of the Territory of Hawaii. It has consequently been necessary for the Legislature to pass laws local in their nature or as in the instances cited, to make classifications in order that the laws

should be just and equitable in their application to the different situations of the various localities. Even at the present time the counties have no power of enacting ordinances imposing license taxes. The nearest approach to this has been recently made (Laws of 1907, . . . Act. 141 . . .), providing that license fees for conducting businesses within the county shall be paid to such counties. The license fees under the act in question are now and were at the time this defendant was arrested, payable to the counties in which such business is conducted. The practical effect, therefore, is precisely the same as if the County of Honolulu had prescribed a license fee of $600.00 for conducting the business of auctioneering in that County and the County of Hawaii (including the District of Hilo) had passed an ordinance requiring a license fee of but $15.00 for conducting that business. Had the counties the power of passing such ordinances, no one could complain because one county required a higher license fee than another.

We respectfully submit for these reasons that the classification made by the Act in question is reasonable and based upon differences in conditions which justify it, and consequently the Act is not in conflict with the 14th Amendment.

The construction placed upon the Hawaiian Statute by the Supreme Court of Hawaii upon the facts involved and the meaning of the Statute, although not decisive, is entitled to great considera-

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tion, and should be followed by this Court unless manifest error appear.

The decisions in this Court are unanimous with regard to the effect which will be given the decisions of State Courts upon the facts involved and the meaning and construction of State statutes. With regard to decisions of Territorial Courts, the rule is that this Court "will lean toward the interpretation" of the Territorial Court. The Supreme Court of Hawaii having construed the law with regard to auctioneers and having reached the conclusion that the sale conducted by this defendant was within the meaning of the Hawaiian statute, and this construction not involving and Federal question, this Court, we respectfully submit, will consider the decision upon those points as having great weight if not decisive.

Missouri K. & T. R. Co. v. McCann & Smizer, 174 U. S. 580, 586, 43 L. ed. 1093, 1097;

Illinois Cent. R. Co. v. Illinois, 163 U. S. 142, 152, 41 L. ed. 107, 111;

Chicago, M. & St. P. R. Co. v. Minnesota, 132 U. S. 418, 456, 33 L. ed. 970, 980;

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 97, 43 L. ed. 910;

Dower v. Richards, 151 U. S. 658, 672, 38 L. ed. 305;

Egan v. Hart, 165 U. S. 193, 41 L. ed. 680.

Copper Queen Consol. Min. Co. v. Arizona, 206 U. S. 474, 479.

Kealoha v. Castle, 210 U. S. 149, 154.

The sale conducted by Toyota was an auction within the meaning of the Hawaiian Statute.

Should there be occasion for considering the question of whether the auction conducted by Toyota was such an auction as was contemplated by the statute, we submit that it is evident from the statement of facts that it was.

It was assumed by the Supreme Court of Hawaii without so deciding, that the statute contemplated a public auction as contended by the defendant, because, although in Section 1343 of the Revised Laws of Hawaii the word "public" does not appear, yet in Section 1345 it is provided that the bond given by every auctioneer "upon receiving an auction license shall contain a provision that he will not sell goods, wares or merchandise or other property except at public auction." It was upon this assumption, most favorable to the claim of defendant, that the Supreme Court of Hawaii decided that the sale conducted by Toyota was a public auction within the meaning of the statute in question.

The basis of the defendant's contention that his acts did not constitute a public auction sale was the fact that the general public was not permitted to make bids at the sale conducted by Toyota, the bidders being confined to a particular class—the retail dealers in fish. The basket lots of fish were, however, auctioned off to the highest bidder of this class (Record p. 2); sold to the person who by an increase over the next highest bid became thereby the highest bidder, so that the element of an auction was present

in the sale, and this is not disputed by the plaintiff in error, Toyota.

We can do no better than adopt the language of the Supreme Court of Hawaii upon the question here involved. It was said by that court:

"Does the fact that bids were accepted from retail dealers of fish, and from no others, place the transactions without the class of sales at public auction within the meaning of the statute? We think not. In the word 'auction' itself there is nothing to lead to the opposite conclusion. In so far as the word 'public' imports publicity, a sale free from concealment, open to the knowledge or view of all, as opposed to one in private or unknown to the community at large, that element clearly existed in the transactions under consideration. There was no attempt at concealment or secrecy. Aside from this element the word 'public' is susceptible of various shades of meaning. It may be so used as to have reference to all of the members of a community, state or nation, or as referring to the community in general or a considerable portion of it. It is in the latter sense, we think, that it is used in the statute in question. The sale was none the less public because of the exclusion from bidding of the class which was excluded. The sale was of lots of fish varying from 70 to 100 pounds each. The class admitted to bid, the retail dealers of fish, included practically all who would be likely to offer bids. The main purpose of auction sales is to obtain the best financial returns for the owners of the property sold. Some measure of discretion is vested in auctioneers as to the precise methods to be pursued in attaining that object, for example, bids need not be accepted from minors or from persons irresponsible either financially or mentally or from drunken persons or from one offering in bad faith or even from one making but a slight raise in his bid over the bid last announced. See *Taylor v. Hartnett*, 55 N. Y. Suppl. 998, 990, 991.

"It may well be conceived that an auctioneer may in good faith and in the exercise of a proper discretion deem it to be to the best interests of his principals, in a series of sales such as described in the agreed statement, to refuse to sell to the consumers who in rare instances might possibly appear and bid to the financial detriment of the retail dealers who in large numbers, and regularly, attend such sales and purchase the great bulk of fish. If the construction contended for by the defendant is correct, an auction sale of miso and soyo, Japanese sauces, excluding all but Japanese, a sale of books excluding all illiterates, a sale of carriage lamps excluding all who have no carriages, a sale of automobile parts excluding all who do not own or operate automobiles, and a sale of fat steers in lots of twenty-five to ranchers and butchers only, would not be sales at public auction. It seems incredible that such was the intention of the legislature. The statute should be given a reasonable construction, not permitting of easy evasions with no practical lessening of financial results to the auctioneer."

It is therefore submitted that there is no error to be found in the judgment of the Hawaiian Supreme Court, and therefore that this writ should be dismissed and the judgment affirmed.

Honolulu, October 16, 1911.

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